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Attorneys for Plaintiff
ATI INDUSTRIES, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ATI INDUSTRIES, INC., Plaintiff, v. ART AND FRAME MART CORPORATION; DOES 1-10; and ROES 1-100, Defendants.	CASE NO. 08-CV-1296 IEG (RBB) **FIRST AMENDED COMPLAINT**

Plaintiff, ATI INDUSTRIES, INC. ("ATI"), by its attorneys, Higgs, Fletcher & Mack, LLP, complains against defendants ART AND FRAME MART CORPORATION ("FRAME MART"), DOES 1-10 ("DOES") and ROES 1-100 ("ROES") as follows:

This is an action for copyright infringement.

THE PARTIES

1. Plaintiff ATI resides in the State of California and is an old and established seller of original oil paintings on canvas in the home décor market. ATI affixes to each painting a Certificate of Authenticity (the "Original Certificate"), which is a unique and original certificate created by ATI's president who designed it to distinguish ATI's name, reputation and its paintings in the marketplace. The Original Certificate enhances the value of the paintings sold by ATI and a portion of

the revenue generated by the sales of paintings is attributable to the Original Certificate's promise of authenticity. ATI obtained a federal copyright registration for its Original Certificate.

2. Defendant FRAME MART is a corporation organized under the laws of California with its principal place of business in Upland, California. FRAME MART is a seller of wall décor and ATI's direct competitor in the sale of original oil on canvas paintings. FRAME MART infringed ATI's copyrights in the Original Certificate by photocopying, reproducing and distributing inferior knock-offs (the "Infringing Certificate") of the Original Certificate. The Infringing Certificate is an exact photocopy of the Original Certificate printed on the same colored, but inferior, paper stock and mimics exactly the Original Certificate. The Original Certificate and the Infringing Certificate pictured together speak for themselves (Exhibit "A"). Defendant FRAME MART has distributed the Infringing Certificate to numerous wholesale, retail and consumer purchasers of paintings throughout the United States, including in this judicial district. FRAME MART also distributes oil paintings with the Infringing Certificate on the worldwide web. On information and belief, defendant's personnel and agents have traveled to and conducted business in this judicial district.

3. Upon information and belief, the DOES are residents of and/or doing business in California and have been copying, reproducing and distributing the Infringing Certificate in this judicial district and in interstate commerce. ATI does not yet know the identities of the various DOES. ATI will amend the Complaint to include the names of these persons or entities and to allege their infringing acts when that information is discovered.

4. Upon information and belief, the ROES are residents of and/or doing business in California and elsewhere and are customers of FRAME MART. The ROE defendants are wholesale and resale distributors and sellers of paintings that they acquired from FRAME MART to which the Infringing Certificates have been

attached. The ROE defendants are infringing ATI's copyrights in the Original Certificate as a result of offering for sale paintings with Infringing Certificates that the ROE defendants obtained from FRAME MART. ATI does not yet know the identities of the ROE defendants, but will identify them in discovery.

JURISDICTION AND VENUE

5. This action for copyright infringement arises under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (the "Copyright Act").

6. This Court has subject matter jurisdiction over ATI's copyright claim pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over FRAME MART because it operates its headquarters in the State of California from which it has distributed the Infringing Certificate and because it delivers goods to customers within this judicial district from its facilities and website.

8. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c) and 1400(a).

FACTS

A. The Original Certificate

9. ATI's president, Richard Guy, created and composed the Original Certificate in 1995. He composed the text, designed the layout of the text, selected the variety of typeface, arranged the text on the page, created the text and appearance of the stamp in the lower right-hand corner, and selected the formal border in order to create a striking and memorable promise of authenticity to affix to the original oil paintings that ATI sells nationwide and worldwide.

10. The Original Certificate employs the repetition of certain words and by its text promises to retailers, consumers and all purchasers of ATI's original oil paintings that "this painting is an original oil painting," "this painting was painted by one artist," "entirely by hand," and verifies "this painting as an Original Hand Painted Oil Painting." In reverse color font, the seal in the lower right-hand corner

bears the inscription "CERTIFICATE AUTHENTICITY" which repeats the title of the certificate contained in the largest and most distinctive wording "Certificate Authenticity." The seal also repeats the key text "Original Hand Painted Oil Painting." The text has cadence and alliteration that is striking and memorable. ATI renders the Original Certificate on heavy, buff-colored card stock paper and affixes it to original hand painted oil canvases that ATI sells in this district and in interstate commerce. ATI's Original Certificate bears the legend - © 2004 in the lower right-hand corner.

11. For more than two decades, ATI has been widely recognized as one of the country's premier sellers of original oil paintings on canvas, each hand painted by a single artist. ATI has built a valuable reputation as a source of original oil paintings that have been executed by one artist entirely by hand. ATI has affixed its distinctive Original Certificate to paintings which have been distributed widely throughout the United States. Retailers, consumers and other purchasers associate the Original Certificate with ATI and it is a valuable statement and assurance of authenticity.

12. Modern methods of mass production and "assembly line" methods of creating wall décor are well known to retailers, consumers and other purchasers of canvas paintings in the wall décor market. Over the years ATI's Original Certificate has helped distinguish ATI's paintings as original and has enhanced the value of ATI's hand painted oil paintings. The Original Certificate has contributed to ATI's sales and profitability.

B. FRAME MART's Access

13. ATI is the exclusive owner of the copyright in the Original Certificate for which the Registrar of Copyrights issued a Registration Certificate No. VA1-626-458 (Exhibit "B").

14. Defendants' access to the Original Certificate cannot be denied. The Court may take notice of the exact replication of the Original Certificate to create

the Infringing Certificate. Defendants had access to the Original Certificate due to its use in the marketplace where ATI and FRAME MART are direct competitors.

15. Agents of FRAME MART have seen the Original Certificate at trade shows attended by both FRAME MART and ATI. FRAME MART owners and managers obtained an Original Certificate, placed it in a photocopy machine, and made numerous Infringing Certificates.

C. FRAME MART's Infringing Conduct

16. FRAME MART has distributed the Infringing Certificate in connection with the sale of oil paintings from its headquarters' location in Upland, California, and has distributed the Infringing Certificate to retailers, purchasers and other consumers in this judicial district and across the United States.

17. FRAME MART has distributed the Infringing Certificate to retailers or resellers in this judicial district and the Infringing Certificate is being used in the sale of FRAME MART's oil paintings in San Diego County.

18. The Infringing Certificate has also been distributed via the sales of oil paintings through FRAME MART's website, located at this uniform resource locator ("URL"): http://artframemart.com/cataloge1.htm.

19. The Infringing Certificate is a photocopy reproduction of the Original Certificate.

20. Customers and consumers have been misled by the defendants' Infringing Certificate to believe that oil paintings offered for sale by defendants were offered by ATI.

21. In January 2008 ATI's president, Richard Guy, witnessed FRAME MART distributing the Infringing Certificate in connection with the sale of oil paintings at an exposition in Atlanta, Georgia. Mr. Guy told FRAME MART's agents that they were infringing ATI's copyrights in the Original Certificate and requested that FRAME MART stop distributing the Infringing Certificate. FRAME MART's agents laughed and refused to stop distributing the Infringing Certificates.

22. The undersigned counsel for ATI wrote a letter on February 8, 2008 to Josef Nazar, President of Art and Frame Mart Corporation, at its address at 521 North Mountain Avenue, Suite E, Upland, California, 91786, demanding that FRAME MART cease and desist from using the Infringing Certificates (Exhibit "C"). The letter sent Mr. Nazar the image of the Original Certificate and the Infringing Certificate in the same form as Exhibit A to this complaint so that the President of Art and Frame Mart would have actual, personal knowledge of the infringing conduct and so that he would have an opportunity to stop it. The United States Postal Service confirmed delivery of the letter to FRAME MART on February 12, 2008. Mr. Nazar and the other Defendants ignored the February 8, 2008 letter and did not respond to it.

23. In February 2008 ATI personnel witnessed FRAME MART prominently displaying the Infringing Certificate in connection with the sale of oil paintings at one of the country's major home furnishing expositions in Las Vegas, Nevada.

24. In May 2008 ATI's personnel witnessed FRAME MART prominently displaying the Infringing Certificate in connection with the sale of oil paintings at one of the country's premier home furnishing expositions in High Point, North Carolina. This is a photograph showing one example of FRAME MART's use of the Infringing Certificate inside its showroom at the High Point home furnishing exposition last May. In this example, FRAME MART prominently displayed the Infringing Certificate on the front, top, left corner of a framed painting of a woman. On information and belief, FRAME MART distributed the infringing certificates to its wholesale and retail customers at the High Point exposition without revealing ATI's copyright claims to its customers, thereby knowingly exposing those customers to liability for copyright infringement.

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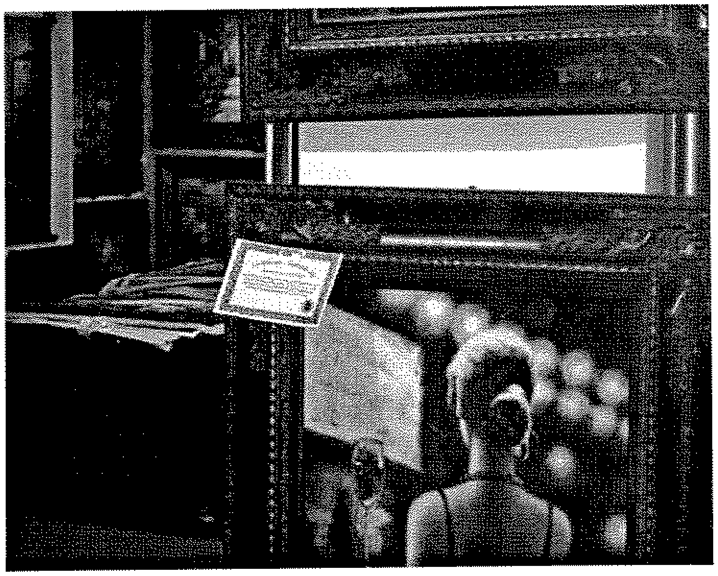

25. FRAME MART is continuing to distribute the infringing certificate via salespersons, internet and other means after receiving the cease and desist letter on February 12, 2008. On information and belief, FRAME MART continues to distribute the infringing certificates to its wholesale and retail customers without revealing ATI's copyright claims to its customers, thereby knowingly exposing those customers to liability for copyright infringement.

D. Defendants' Willfulness

26. Defendants' photocopying the Original Certificate on the same color paper is the product of conscious, deliberate, and willful infringement for profit by defendants.

27. Defendants' conscious business decision to photocopy the Original Certificate to create numerous Infringing Certificates to use in FRAME MART's sales of oil paintings proves FRAME MART's purposeful use of the Original Certificate to increase the value and enhance the marketplace appeal of FRAME MART's oil paintings. Frame Mart's deliberate copying of the Original Certificate and use of Infringing Certificates proves the value of the Original Certificate in the marketplace.

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28. Defendants' continuing willful infringement of ATI's intellectual property rights is proved by its agents' refusal to cease and desist when requested by Richard Guy, and its refusal to respond to the February 8, 2008 cease and desist letter. Defendants have continued their infringing conduct after receiving visual proof and being notified in writing that the Infringing Certificate is a copy of the Original Certificate.

29. ATI served the original complaint on defendant FRAME MART by personal delivery at FRAME MART's corporate offices on July 21, 2008 at 4:50 p.m. The process server personally served Josef Nazar, President of FRAME MART. Mr. Nazar is the same individual that received the cease and desist letter in February 2008.

30. Neither ATI nor its undersigned counsel received any contact from FRAME MART or counsel representing FRAME MART concerning service of the complaint after the complaint was served.

31. FRAME MART and Mr. Nazar are at this moment attending a major home furnishings exposition in Las Vegas, Nevada. Continually since Monday, July 28, 2008, FRAME MART and Mr. Nazar have prominently displayed multiple copies of the Infringing Certificate in its Las Vegas showroom attached to paintings FRAME MART is offering for sale. FRAME MART, with the express knowledge and at the direction of Mr. Nazar, is continuing to infringe ATI's Original Certificate even after Mr. Nazar personally received ATI's complaint on July 21 that explained ATI's rights and the harm caused by FRAME MART's ongoing infringement. On information and belief, FRAME MART is distributing the Infringing Certificates to its wholesale and retail customers at the Las Vegas exposition without revealing ATI's copyright claims to its customers, thereby knowingly exposing those customers to liability for copyright infringement.

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COUNT AGAINST ALL DEFENDANTS

(Copyright Infringement; 17 U.S.C. §§ 101 *et seq.*)

32. Plaintiff repeats and realleges the allegations set forth above in paragraphs 1 through 34.

33. ATI is the exclusive copyright holder of the Original Certificate.

34. Each of the defendants had access to the Original Certificate, as proved by the act of photocopying an Original Certificate to create the Infringing Certificates.

35. ATI did not grant defendants authority to use the Original Certificate. Defendants' infringement of ATI's Original Certificate violates ATI's exclusive rights in the Original Certificate.

36. Each of the defendants knowingly caused, participated in, materially contributed to and derived economic benefit from the infringement of ATI's Original Certificate.

37. Each of the defendants specifically including but not limited to FRAME MART's wholesale and retail customers, has wrongfully profited and continues to profit from its infringement of ATI's Original Certificate. Each of the defendant's infringing conduct has caused and continues to cause actual damages to ATI as well as irreparable injury to ATI in an amount that is not yet known. Unless enjoined and restrained, defendants' infringing conduct will cause further irreparable injury, leaving ATI with no adequate remedy at law.

38. Defendants' continuation of its unlawful conduct after being warned by ATI in person and after receiving the February 8, 2008 cease and desist letter warrants punishment to deter such willful violations of other people's rights.

39. ATI is therefore entitled to injunctive, monetary and other relief, including punitive damages.

WHEREFORE, plaintiff demands a trial by jury pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and seeks judgment:

(a) declaring that each of the defendants has infringed ATI's copyrights in the Original Certificate;

(b) declaring that the defendants have willfully infringed ATI's copyrights in and to the Original Certificate in violation of the Copyright Act;

(c) enjoining each of the defendants, and their respective officers, directors, agents, servants, employees, representatives, attorneys, related companies, successors, assigns, and all others in concert or participation with them, from infringing plaintiff's copyrights in the Original Certificate, or any prior and subsequent versions of it;

(d) ordering the recall and destruction of all copies of the Infringing Certificate in the possession, custody and/or control of defendants;

(e) awarding ATI the actual damages it has sustained as a result of defendants' copyright infringement and awarding ATI all profits derived by defendants including but not limited to FRAME MART's wholesale and retail customers, as a result of their infringing activities pursuant to 17 U.S.C. § 504(b), plus interest on those amounts;

(f) ordering DOE and ROE defendants including but not limited to FRAME MART's wholesale and retail customers, to account for and disgorge to ATI all gains, profits, and advantages derived by their copyright infringement pursuant to 17 U.S.C. § 504(b), plus interest on those amounts;

(g) awarding ATI punitive damages based on the defendants' willful infringement; and

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(h) awarding ATI its costs, attorney's fees, and all other and further relief that the Court deems just and proper.

DATED: July 30, 2008

HIGGS, FLETCHER & MACK LLP

By: [signature]
THOMAS W. FERRELL, ESQ.
Attorneys for Plaintiff
ATI INDUSTRIES, INC.

EXHIBIT A

Certificate Authenticity

Certificate of Authenticity

This Certificate of Authenticity, confirms that this painting is an original oil painting. This painting was painted by one artist entirely by hand. This certificate officially establishes this painting as an Original Hand Painted Oil Painting

CERTIFICATE
Original Hand Painted Oil Painting
AUTHENTICITY

© 2004

Certificate Authenticity

Certificate of Authenticity

This Certificate of Authenticity, confirms that this painting is an original oil painting. This painting was painted by one artist entirely by hand. This certificate officially establishes this painting as an Original Hand Painted Oil Painting

CERTIFICATE
Original Hand Painted Oil Painting
AUTHENTICITY

© 2004

EXHIBIT B

Certificate of Registration

SEAL OF THE UNITED STATES COPYRIGHT OFFICE 1870

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number:

VA 1-626-458

Effective date of registration:

February 1, 2008

Title

Title of Work: Small Certificate of Authenticity

Nature of Work: Text

Completion/ Publication

Year of Completion: 2001

Date of 1st Publication: June 1, 2001 **Nation of 1st Publication:** United States

Author

- **Author:** ATI Industries, Inc.

Author Created: Text

Work made for hire: Yes

Citizen of: United States

Anonymous: No **Pseudonymous:** No

Copyright claimant

Copyright Claimant: ATI Industries, Inc.

PO Box 2222, Mission Viejo, CA 92690

Limitation of copyright claim

Previously registered: No

Certification

Name: Michael J. Hoisington, Esq., authorized agent of ATI Industries, Inc.

Date: January 30, 2008

Correspondence: Yes

Copyright Office notes: Regarding deposit: year date in copright notice is 2004.

EXHIBIT C

HIGGS FLETCHER & MACK LLP

San Diego's Law Firm Since 1939

Thomas W. Ferrell
Partner

tferrell@higgslaw.com
D 619.595.4235

February 8, 2008

VIA CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Joseph Nazar
President
Art and Frame Mart Corporation
521 North Mountain Avenue, Suite E
Upland, CA 91786

Re: CEASE AND DESIST
File No. 105314-00002

Dear Mr. Nazar:

I represent ATI Industries, the owner of all rights to the copyrighted Certificate of Authenticity, a copy of which is attached to this letter (the "Original Certificate"). We have learned that Art and Frame Mart Corporation is reproducing, selling and distributing an identical copy of ATI's Original Certificate (the "Infringing Certificate"). The Infringing Certificate is a poor quality but exact photocopy of ATI Industries' Original Certificate. I have attached images of the Original Certificate and the Infringing Certificate. They speak for themselves.

Your use and distribution of the Infringing Certificate infringes our client's copyright rights under federal and common law. ATI demands that Art and Frame Mart Corporation immediately:

(1) Cease and desist all sales, distribution, copying or other uses of the Infringing Certificate and that you deliver all unused, undistributed copies of the Infringing Certificate to us for destruction;

(2) Identify all customers, purchasers, distributors, retailers and anyone else to whom you have delivered the Infringing Certificate;

(3) Contact all wholesalers, retailers and distributors who have in their inventory or possession any products that display or contain the Infringing Certificate and instruct them

HIGGS FLETCHER & MACK LLP

San Diego's Law Firm Since 1939

Joseph Nazar
February 8, 2008
Page 2

immediately to remove all of the Infringing Certificates from commerce and to save them for an accounting;

(4) Provide a detailed accounting of all sales of any description in which the Infringing Certificate was affixed to any item or was a part of the sale, with a breakdown of the volume and value of sales to each retailer, wholesaler, customer distributor and purchaser; and

(5) Respond to the undersigned in writing by no later than Wednesday, February 20, 2008 to assure us of your compliance with these demands and to discuss the possible informal resolution of ATI Industries' potential legal claims.

Art and Frame Mart Corporation's continued unlawful use of the Infringing Certificate is damaging our client and must immediately cease. Accordingly, if we do not hear from you by February 20 at 5:00 p.m., we intend to take all steps necessary to protect ATI Industries' rights and interests by initiating a lawsuit against Art and Frame Mart Corporation seeking, among other things, an injunction, an accounting of all sales, compensatory damages, disgorgement of profits, and punitive damages. This demand does not waive any other rights, claims or remedies that ATI Industries may have against Art and Frame Mart Corporation.

Very truly yours,

THOMAS W. FERRELL
of
HIGGS, FLETCHER & MACK LLP

TWF/ldm

cc: ATI Industries
Mitchell B. Dubick, Esq.
Charles F. Reidelbach, Jr., Esq.
Michael J. Hoisington, Esq.

843235.1

Certificate Authenticity

Certificate of Authenticity

This Certificate of Authenticity, confirms that this painting is an original oil painting. This painting was painted by one artist entirely by hand. This certificate officially establishes this painting as an Original Hand Painted Oil Painting

CERTIFICATE Original Hand Painted Oil Painting AUTHENTICITY

© 2004

Certificate Authenticity

Certificate of Authenticity

This Certificate of Authenticity, confirms that this painting is an original oil painting. This painting was painted by one artist entirely by hand. This certificate officially establishes this painting as an Original Hand Painted Oil Painting

CERTIFICATE Original Hand Painted Oil Painting AUTHENTICITY

7004 0750 0001 2926 1118

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Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$ 5.38

Postmark Here

Sent To: Joseph Nazar – Art + Frame Mart Corp.
Street, Apt. No.; or PO Box No.: 521 N. Mtn Ave, #E
City, State, ZIP+4: Upland, CA 91786

PS Form 3800, June 2002 — See Reverse for Instructions

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Joseph Nazar
Art + Frame Mart Corp.
521 N. Mountain Ave. #E
Upland, CA 91786

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery 2/12/08

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☒ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7004 0750 0001 2926 1118

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

RE: *ATI Industries, Inc. v. Art and Frame Mart Corporation, et al.*

VENUE: United States District Court – Southern District of California

CASE NO.: 08-CV-1296 IEG (RBB)

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 401 West A Street, Suite 2600, San Diego, CA 92101. On July 30, 2008, I served the within documents, with all exhibits (if any):

FIRST AMENDED COMPLAINT

☐ **(BY ELECTRONIC SERVICE)** I am familiar with the United States District Court, Central District of California's practice for collecting and processing electronic filings. Under that practice, documents are electronically filed with the Court. The Court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the filing party, the assigned judge, and any registered users in the case. The NEF will constitute service of the document. Registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities.

☒ **(BY MAIL)** I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Joseph Nazar Art and Frame Mart Corporation 521 Mountain Avenue, Unit E Upland, CA 91788	Telephone: (877) 322-2100 Facsimile: (909) 373-0383

I declare that I am employed in the offices of a member of this Court at whose direction the service was made.

Executed on July 30, 2008, at San Diego, California.

Lesli D. Miller	[signature]
(Print Name)	(Signature)